No. 88-189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BELL ATLANTIC,

Petitioner,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, *et al.*,

Respondents.

AT&T'S OPPOSITION TO PETITION FOR CERTIORARI

HOWARD J. TRIENENS*
DAVID W. CARPENTER
JAMES A. HUTTENHOWER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JOHN D. ZEGLIS
FRANCINE J. BERRY
MARK C. ROSENBLUM
295 North Maple Avenue
Basking Ridge, NJ 07920
(201) 221-2000

Attorneys for Respondent American Telephone and Telegraph Company

*Counsel of Record

QUESTION RESTATED

Whether a 1986 District Court order that interpreted a previously-entered antitrust injunction could be mooted on appeal by an intervening FCC decision when: (1) the question of sanctions for past violations of the antitrust injunction as interpreted is pending, (2) the FCC decision was a response to the District Court order, is more limited than the order, and cannot prevent repetition of the dispute between the parties in the future, and (3) no one claims that the underlying antitrust injunction is itself now moot?

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REASONS FOR DENYING THE WRIT

This case arises under the 1982 antitrust Decree that was entered to prevent the Bell Operating Companies ("RBOCs") from using their control over "bottleneck" local telephone monopolies to foreclose or impede competition in related competitive markets.[1] In its November, 1986 order, the District Court interpreted this injunction to bar a classic "tie-in" arrangement in which one RBOC (U S West) offered to provide its monopoly facilities at special low rates only if a customer also obtained competitive private network switching services from U S West, rather than from AT&T or one of U S West's other switching service competitors. The Court of Appeals affirmed this interpretation. *See* App. 10a-15a; *see also id.* 36a (Starr, J., dissenting on other grounds).

The sole question raised in the petition is whether the issue of Decree interpretation was somehow rendered moot on appeal by

[1] *United States* v. *AT&T*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland* v. *United States*, 460 U.S. 1001 (1983).

a 1987 FCC decision that was obtained by Bell Atlantic *in response* to the District Court's 1986 order. *See* Petition ("Pet."), p. 6. There is no reason or basis to review this mootness question. The Court of Appeals' holding is a correct application of well-settled principles to a set of unique facts and does not conflict with the decision of any other court of appeals. Moreover, the mootness question possesses no conceivable national importance.

1. That there was a live controversy in the Court of Appeals is starkly demonstrated by the fact that the RBOC who is the subject of the November, 1986 order (U S West) vigorously opposed Bell Atlantic's mootness claims and that the other three RBOCs who participated in the appeal similarly urged the Court of Appeals to decide the Decree interpretation question on the merits.[2] They did so because there are at least three separate reasons why the subsequent 1987 FCC decision could not moot the issue of Decree interpretation presented by U S West's conduct.

First, as U S West argued below, the short answer to Bell Atlantic's mootness claim is that the District Court order did not merely establish a rule of conduct for the future. *See* U S West Reply Br., p. 12 (Jan. 19, 1988). It established that U S West had committed violations of the Decree in the past and will be subject to sanctions when the Justice Department completes its pending investigation.[3] As the very case that Bell Atlantic cites recog-

[2]Reply Br. of U S West, pp. 11-12 (Jan. 19, 1988) (arguing case is not moot); Opposition of Pacific Telesis Group to Motion for Extension of United States, pp. 3-4 (Dec. 11, 1987) (same); *see* Reply Br. of Ameritech, pp. 2-3 (Jan. 19, 1988) (urging Court of Appeals to decide merits); Br. of NYNEX, pp. 4-5 (Nov. 13, 1987) (same); *see also* Br. of United States (December 21, 1987) (same); Supplemental Br. of AT&T, pp. 3-8 (Feb. 11, 1988) (arguing case is not moot).

[3]App. 5a-6a & 15a-20a (holding that U S West had engaged in discriminatory pricing of exchange access facilities by offering GSA discounts of between $77,000 and $150,000 per month only if it used U S West switching services and that this price discrimination violated the Decree); *see also id.* 18a n.6 (recognizing that the only matter that the District Court did not conclusively decide was whether there had also been discriminatory pricing of Dial 8 lines in the past).

nizes, an FCC decision cannot moot antitrust issues that determine whether damages or other sanctions are awarded for past misconduct. *Western Electric Co.* v. *Milgo Electronics Corp.*, 568 F.2d 1203, 1208 (5th Cir. 1978) (antitrust claim for an "award of damages . . . is not moot[ed]" by FCC decision). *See Powell* v. *McCormack*, 395 U.S. 486, 495-500 (1969). This vividly demonstrates that there is no conflict among the courts of appeals.

Second, this is *not* a case in which "[a]ll the parties recognize that [the FCC order] prevents" recurrence of the challenged U S West conduct in the future. *Compare Western Electric Co.* v. *Milgo Electronics Corp.*, *supra*, 568 F.2d at 1207-08. To the contrary, AT&T and U S West each disputed the point below. *See* p. 2 n.2, *supra*. And Bell Atlantic did not even attempt to satisfy the "heavy" burden of establishing that the 1987 FCC decision makes it "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield* v. *Chesapeake Bay Foundation, Inc.*, 108 S.Ct. 376, 386 (Dec. 1, 1987) (emphasis in original), *quoting United States* v. *W.T. Grant Co.*, 345 U.S. 629, 633 (1953), and *United States* v. *Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968). This burden cannot be met.

Indeed, as the Court of Appeals found (App. 21a) and as Bell Atlantic admits (Pet., p. 10 n.6), the 1987 FCC order does not even address discrimination in the provision of Dial 8 lines, and could not prevent this price discrimination in the future. *See* App. 16a-18a.[4] Similarly, the 1987 FCC order is equally incapable of preventing recurrence of the anticompetitive conduct with respect to the "local exchange access" lines. *See* App. 10a-16a.

[4]Bell Atlantic is thus reduced (Pet., p. 10 n.6) to asking the Court to grant certiorari to consider Bell Atlantic's contention that the Dial 8 line issue somehow was not before the Court of Appeals at all. However, this was one of the two forms of price discrimination that was challenged by AT&T in the District Court, and U S West conceded that the District Court enjoined future discrimination in the provision of Dial 8 lines. *See* U S West Br., p. 40 (Nov. 6, 1987).

The overriding fact is that FCC regulations have always provided that U S West and other RBOCs must establish non-discriminatory charges for the monopoly telephone facilities that provide access to AT&T's CCSA service and to the "CCSA-equivalent" services of AT&T competitors. *See* App. 48a. Yet these regulations did not prevent U S West from misusing its local monopolies to foreclose competition in the past. What U S West did was to devise a new switching service (which U S West called "Centrex-ETN"), unilaterally decide that its Centrex-ETN would not be treated as a CCSA-equivalent service, and, on that basis, unilaterally exempt its switching customers from the exchange access charges that apply to customers of AT&T's CCSA services.

The 1987 FCC decision cannot prevent repetition of this conduct. It merely holds that U S West's Centrex-ETN service is equivalent to AT&T's CCSA and that the same access charges apply to customers of both services. Nothing in the FCC order could prevent U S West from hereafter, again, developing new private network switching services, concocting arguments that they are different from AT&T's CCSA, and unilaterally giving U S West's switching service customers access charge discounts.

Indeed, the risk of repetition is acute because U S West has a demonstrated propensity for price discrimination, even in the face of explicit statements that it is illegal. U S West engaged in the discrimination that led to this proceeding after it had made formal commitments to the Decree court that it would always charge the same access rates, regardless of whose switching services were selected. *See* Memorandum Order, pp. 6-7 (June 28, 1985) (quoting U S West's prior commitment). This demonstrates that U S West has continuing incentives to engage in price discrimination when it advances U S West's competitive interests and that only an order of an antitrust court can prevent future misconduct. This is especially so here where the Decree was entered because the District Court found that FCC regulation

could not prevent such anticompetitive conduct by the RBOCs. *See United States* v. *AT&T*, *supra*, 552 F. Supp. at 170.

Finally, there is no authority for Bell Atlantic's mootness claim. Bell Atlantic cannot, and does not, claim that mootness principles require that the pertinent provisions of the injunction (Section II(B) and Appendix B, Section B) be vacated. The underlying issue on the merits is thus the construction of an injunction that was entered in 1982 and that remains in effect today. *Western Electric Co.* v. *Milgo Electronics Corp.*, *supra*, did not involve such decree interpretation issues. And there is no case that even suggests, much less holds, that jurisdictional principles can prevent a court from issuing interpretations of a concededly valid and binding injunction when, as here, the United States, AT&T, U S West, and three other RBOCs urgently sought the interpretation to clarify their rights and obligations (*see* p. 2 n.2, *supra*), and when only one of the nine parties to the decree contended the interpretation is not needed.

2. In any event, the mootness question presented by this case has no conceivable national importance. Because Bell Atlantic has not cited a single case in which mootness issues have arisen in the context of a decree interpretation dispute, there is no reason to believe that such mootness questions will ever arise again, much less that they will arise with any frequency. Indeed, questions whether agency decisions moot antitrust or other cases seldom arise in any context.

And there is no substance to Bell Atlantic's claim that the District Court's interpretation of the Decree was a novel one and that review of the mootness issue is somehow warranted on this ground. *See* Pet., pp. 17-18. All three members of the Court of Appeals indicated that the terms, purposes, and history of the Decree required the District Court's order; the members of the panel disagreed only on which provisions of the Decree supported it. *Compare* App. 15a-20a (relying on Section II(B) and Appendix B, Section B), *with id.* 36a (Starr, J., dissenting) (the "better course" would be to rely on Appendix B alone).

Thus, the members of the panel all recognized that, contrary to Bell Atlantic's misstatements (Pet., p. 6), the District Court's order does not prevent the RBOCs from charging different rates to different classes of customers and does not call into question the regulatory classifications of customers that the Decree was not intended to disturb. Rather, all the District Court's order does is prevent the RBOCs from charging a single customer (or class of customers) lower rates for essential monopoly facilities if the customer obtains a related competitive service from the RBOC, rather than its competitor.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

HOWARD J. TRIENENS*
DAVID W. CARPENTER
JAMES A. HUTTENHOWER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7000

JOHN D. ZEGLIS
FRANCINE J. BERRY
MARK C. ROSENBLUM
295 North Maple Avenue
Basking Ridge, NJ 07920
(201) 221-2000

Attorneys for Respondent American Telephone and Telegraph Company

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**Counsel of Record*